TM Feroze Khan & Ors v Meera Hussain bin TM Mohamed Mydin

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–02–39 OF 2003
ABDUL KADIR SULAIMAN, RICHARD MALANJUM AND NIK HASHIM JJCA
30 JUNE 2006

Islamic Law — Gifts — Constituent elements to constitute valid gift — Gift not vested in beneficiary during lifetime of deceased trustee — Whether gift was valid under Islamic law

Trusts and Trustees — Express trust — Creation — No vesting of property in beneficiary during lifetime of deceased trustee — Trust deed executed and registered with land registry — Whether trust was valid

Trusts and Trustees — Land — Claim by beneficiary of estate — Whether property was held on trust by deceased and therefore not formed part of his estate

Trusts and Trustees — Land — Creation of trust — No vesting of property in beneficiary during lifetime of deceased trustee — Trust deed executed and registered with Land registry — Whether trust was valid

The appellants and the respondent were the children of the deceased father by his marriage to the first and second wives respectively. On or about 2 February 1968, the deceased transferred a piece of land on which nine houses were erected ('the property') to himself as trustee for the benefit of the respondent who was then only eight years old. The memorandum of transfer was registered at the Pulau Pinang Land Registry. Simultaneously the deceased on the same executed a trust deed declaring himself to be trustee holding the property in trust for the respondent and agreeing to transfer the property to any such person as the respondent might at any time direct. Physical possession of the property was never given to the respondent during the lifetime of the deceased since the property were occupied by tenants. The property was also not vested in the name of the respondent during the lifetime of the deceased. On 12 May 1991, the deceased passed away. The respondent subsequently obtained an ex-parte vesting order from the High Court Pulau Pinang vesting the property in his own name. The order was duly registered with the Land Registry Pulau Pinang whereby the property was vested in favour of the respondent.

Before this court, the appellants argued that the purported gift of the property was null and void under Islamic law because was never vested in the name of the respondent during the lifetime of the deceased. Also, the receipt of rental income from the property by the deceased was demonstrated that the deceased had no actual intention to gift the property to the respondent. The High Court held for the respondent and the appellant appealed.

The main agreed question in this appeal was whether the trust deed and the transfer both dated 2 February 1968 of the property by the deceased father to the respondent was null and void under Islamic law since possession of the property was never given to the respondent during the lifetime of the deceased father and the property was never vested in the name of the respondent during the lifetime of the deceased.

Held, dismissing the appeal:

(1) Since the property was a rent controlled property and tenanted, physical delivery of possession could not be given to the respondent. The collection of rental by the deceased trustee would be equivalent to possession of the property by the deceased trustee on behalf of the respondent beneficiary. The deceased had effected a legal transfer of the property on trust for the respondent and thereby transferred the legal possession of the property to the respondent. This was the only means for effecting transfer under the National Land Code 1965 ('the NLC'). Hence, the deceased had done everything possible within his means to deliver legal possession as the gifted property was susceptible of. Thus, the deceased's bona fide intention to give the property as a gift to the respondent was manifestly clear and unequivocal (see para 15).

(2) There was no dispute that the respondent had subsequently vested the property in his name. Hence, the gift had been perfected (see para 16). It was also no disputed that the trust was created and the transfer was executed on the same date 2 February 1968 and the respondent lived with the deceased father until the latter passed away in 1991 and for the period of 23 years since the creation of trust the deceased did not attempt to revoke the trust or the transfer effected in favour of the respondent. So, the presumption was that the gift was valid (see para 17). In this case, the three conditions for a valid gift under the Islamic law had been fully satisfied. Therefore the gift was validly made even under the Islamic law (see para 18).

(3) The transfer was duly registered in favour of the deceased as the trustee for the respondent. Therefore under s 340(1) of the NLC the deceased trustee would have indefeasible title and such indefeasibility could only be defeated by any of the specified grounds under s 340(2) thereof. However, the appellants had not brought themselves within s 340(2) of the NLC, and therefore, the appellants were not entitled to the declaration that the trust deed and the transfer were null and void (see para 26).

(4) There was a clean and clear transfer of the property to the trustee and a written trust deed executed by the deceased which had been duly registered with the Land Registry. The intention of the deceased to give the property as a gift to the respondent was very clear by the express terms of the trust deed. In fact the registration of the legal transfer was the only way the property could be transferred to the trustee under the NLC which the deceased had done in this case. The deceased did not reserve any express power of revocation in the trust deed. Further, there was no objection from the appellants during the deceased's lifetime over the creation of trust in favour of the respondent. Therefore the trust was valid and irrevocable. It was a completely constituted trust and thus enforceable against the deceased or his estate, irrespective of whether or not possession of the property was given to the respondent during the lifetime of the deceased and whether or not the property was vested in the name of the respondent during the lifetime of the deceased and whether or not the deceased received and declared the rental as his personal income (see para 27).

[Bahasa Malaysia summary

Perayu-perayu dan responden merupakan anak-anak si mati bapa melalui perkahwinan dengan isteri pertama dan keduanya. Pada 2 Februari 1968, si mati telah memindahhak sebidang tanah yang mana sembilan buah rumah dibina ('hartanah tersebut') kepada dirinya sebagai pemegang amanah untuk manfaat responden yang pada masa itu hanya berumur lapan tahun. Memorandum pindahhak telah didaftarkan di Pejabat Pendaftaran Tanah Pulau Pinang. Pada masa sama, si mati juga telah menyempurnakan satu surat ikatan amanah mengisytiharkan dirinya pemegang amanah memegang hartanah tersebut yang diamanahkan untuk responden dan bersetuju untuk memindahhak hartanah tersebut kepada sesiapa yang responden mungkin arahkan pada bila-bila masa. Pemilikan fizikal hartanah tersebut tidak pernah diberikan kepada responden sepanjang hayat si mati memandangkan hartanah tersebut telah didiami penyewa-penyewa. Hartanah tersebut juga tidak diletakkan dalam nama responden sepanjang hayat si mati. Pada 12 Mei 1991, si mati telah meninggal dunia. Responden berikutan itu mendapatkan perintah pemberian ex parte daripada Mahkamah Tinggi Pulau Pinang memberikan hartanah tersebut dalam nama beliau sendiri. Perintah itu kemudian telah didaftarkan di Pejabat Pendaftaran Tanah Pulau Pinang di mana hartanah tersebut terletak hak kepada responden.

Di hadapan mahkamah ini, perayu-perayu berhujah bahawa hadiah yang dimaksudkan hartanah tersebut adalah terbatal dan tidak sah di bawah undang-undang Islam kerana tidak pernah terletak hak dalam nama responden semasa hayat si mati. Juga, penerimaan pendapatan sewa daripada hartanah tersebut oleh si mati menunjukkan bahawa si mati tiada niat sebenar memberikan hadiah hartanah tersebut kepada responden. Mahkamah Tinggi memutuskan bagi pihak responden dan perayu telah mengemukakan rayuan.

Persoalan utama yang dipersetujui dalam rayuan ini adalah sama ada surat ikatan amanah dan pindahhak kedua-duanya bertarikh 2 Februari 1968 hartanah tersebut

oleh si mati kepada responden adalah terbatal dan tidak sah di bawah undang-undang Islam memandangkan pemilikan hartanah tersebut tidak pernah diberikan kepada responden semasa hayat si mati bapa dan hartanah tersebut tidak pernah terletak hak dalam nama responden semasa hayat si mati.

Diputuskan, menolak rayuan tersebut:

(1) Memandangkan hartanah tersebut merupakan hartanah kawalan sewa dan disewa, penyerahhakan fizikal pemilikan tidak boleh diberikan kepada responden. Kutipan sewa oleh si mati pemegang amanah sama seperti pemilikan hartanah oleh si mati bagi pihak responden benefisiari. Si mati telah melaksanakan satu pindahhak sah hartanah tersebut atas amanah bagi pihak responden dan oleh itu telah memindahhak pemilikan sah hartanah tersebut kepada responden. Hanya inilah cara untuk menguatkuasakan pindahhak di bawah Kanun Tanah Negara 1965 ('KTN'). Oleh itu, si mati telah melakukan segala yang mungkin dalam upayanya untuk menyerahkan pemilikan sah memandangkan hartanah yang dihadiahkan mudah dibuktikan. Oleh itu niat bona fide si mati untuk memberikan hartanah itu sebagai hadiah kepada responden adalah jelas dan tak taksa (lihat perenggan 15).

(2) Tiada pertikaian yang responden telah meletakhak hartanah tersebut dalam namanya. Oleh itu, hadiah tersebut telah disempurnakan (lihat perenggan 16). Ia juga tidak dipertikaikan bahawa manah yang dibentuk dan dipindahhak telah disempurnakan pada tarikh sama 2 Februari 1968 dan responden tinggal bersama si mati bapa sehingga beliau meninggal dunia dalam tahun 1991 dan untuk tempoh 23 tahun sejak pembentukan amanah si mati tidak mencuba untuk membatalkan amanah itu atau melaksanakan pemindahhak kepada responden. Jadi, andaiannya adalah hadiah itu sah (lihat perenggan 17). Dalam kes ini, tiga syarat untuk hadiah itu sah di bawah undang-undang Islam telah dipenuhi. Oleh itu hadiah itu dibuat dengan sah meskipun di bawah undang-undang Islam (lihat perenggan 18).

(3) Pindahhak itu telah didaftarkan untuk si mati sebagai pemegang amanah bagi pihak responden. Oleh itu di bawah s 340(1) KTN si mati pemegang amanah mempunyai hakmilik yang tidak boleh disangkal dan hakmilik sedemikian hanya boleh digagalkan oleh mana-mana alas an yang ditetapkan di bawah s 340(2) KTN. Bagaimanapun, perayu-perayu tidak terangkum di bawah s 340(2) KTN, dan oleh itu perayu-perayu tidak berhak kepada deklarasi bahawa suratikatan amanah dan pindahhak itu adalah terbatal dan tidak sah (lihat perenggan 26).

(4) Terdapat pindahahk hartanah yang jelas kepada pemegang amanah dan satu suratikatan amanah bertulis telah disempurnakan oleh si mati yang mana telahpun didaftarkan dengan Pejabat Pendaftaran Tanah. Niat si mati untuk memberikan hartanah tersebut sebagai hadiah kepada responden adalah jelas melalui terma-terma nyata surat ikatan amanah tersebut. Bahkan pendaftaran pidahhak sah itu satu-satunya cara hartanah tersebut boleh dipindahhakkan

kepada pemegang amanah si bawah KTN yang mana si mati telah lakukan dalam kes ini. Si mati tiada bantahan daripada perayu-perayu semasa hayat si mati tentang pembentukan amanah untuk responden. Oleh itu amanah tersebut adalah sah dan tidak boleh dibatalkan. Pada keseluruhannya ia merupakan pembentukan amanah dan oleh itu boleh dikuatkuasakan terhadap si mati atau harta pusakanya, tidak kira sama ada atau tidak pemilikan hartanah tersebut telah diberikan kepada responden semasa hayat si mati dan sama ada atau tidak hartanah tersebut diletakhak dalam nama responden semasa hayat si mati dan sama ada atau tidak si mati menerima dan mengisytiharkan sewaan itu sebagai pendapatan peribadinya (lihat perenggan 27).]

Notes

For a case on constituent elements to constitute valid gift, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 483.

For cases on creation of express trust, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2063–2065.

For cases on claim by, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2063–2065.

Cases referred to

Ainan bin Mahamud v Syed Abu Bakar bin Habib Yusoff & Others [1939] MLJ 209 (refd

Azeshabi v Kathoonbi AIR 1966) Madras 462 (refd)

Bahadun bin Haji Hassan Decd, Re [1974] 1 MLJ 14 (refd)

Fateh Mohd v Mitha AIR 1926 Lahore 286 (refd)

Man bin Mihat, Decd, Re [1965] 2 MLJ 1 (refd)

Muhara Bibi v Maharulla AIR 1933 Calcutta 785 (refd)

Noor Jahan v Muftkhar Dad Khan AIR 1970 All 170 (refd)

Omar bin Shaik Salleh (M) and Hanisah binte Shaik Salleh (f), Infants, In the Matter of; Shaik Salleh bin Omar Jammal v Marriambee binte Shaik Omar (mw) [1948] MLJ 186 (refd)

Tan Chiw Thoo v Tee Kim Kuay [1997] 2 MLJ 221 (refd)

Tengku Haji Jaafar ibni Almarhum Tengku Muda Ali & Anor v Government of Pahang [1987] 2 MLJ 74 (refd)

Roberts alias Kamarulzaman v Ummi Kalthom [1996] 1 MLJ 163 (refd)

Wan Naimah v Wan Mohamad Nawawi [1974] 1 MLJ 41 (refd)

Legislation referred to

Evidence Enactment s 112

Guardianship of Infants Ordinance

Land Enactment 1897

Land Enactment 1903

Land Enactment 1911

Land Regulations 1889

Limitation Act 1953

National Land Code 1965 s 340(1), (2)

Transfer of Property Act 1883 [India] s 129

Appeal from: Civil Suit No 22–19 of 1993 (High Court, Pulau Pinang)

Hamid Sultan bin Abu Backer (Hamid Sultan Loga Chitra & Associates) for the appellants.
M Kanesan (M Kanesan & Associates) for the respondent.

Nik Hashim JCA (delivering judgment of the court):

BACKGROUND

[1] The main agreed question in this appeal is whether the trust deed and the transfer both dated 2 February 1968 of a piece of land described as Lot 465, Sek 11 — W Daerah Timur Laut, Georgetown, Pulau Pinang on which nine houses were erected (the property) by the deceased father to his son (the respondent) was null and void under Islamic law since possession of the property was never given to the respondent during the lifetime of the deceased father and the property was never vested in the name of the respondent during the lifetime of the deceased.

[2] On 24 May 2005, we ruled that the trust deed and the transfer of the property were valid and hence we dismissed the appeal with costs and ordered that the deposit be paid to the respondent to account of his taxed costs.

[3] The facts of the case were that the appellants and the respondent were the children of the deceased father by his marriage to the first and second wives respectively.

[4] On or about 2 February 1968, the deceased transferred the property to himself as trustee for the benefit of the respondent who was then only eight years old. The memorandum of transfer was registered at the Pulau Pinang Land Registry. Simultaneously, the deceased on the same day (ie 2 February 1968) executed a trust deed declaring himself to be trustee holding the property in trust for the respondent and agreeing to transfer the property to any such person as the respondent might at any time direct.

[5] Physical possession of the property was never given to the respondent during the lifetime of the deceased since the property has been occupied by tenants. Neither the property was vested in the name of the respondent during the lifetime of the deceased.

[6] The deceased had on 20 August 1988 amended his name in the title of the property from 'Mohamed Mydin Merican bin Meera Hussain @ TM Mohamed Mydin bin Meera Hussain' to TM Mohamed Mydin (K/P 1837149).

[7] On 12 May 1991, the deceased passed away. At that time, the respondent was about 30 years old.

[8] On or about 5 October 1992, the respondent obtained an ex-parte vesting order from the High Court Pulau Pinang vesting the property in his own name. The order was duly registered with the Land Registry Pulau Pinang whereby the property was vested in favour of the respondent.

[9] Before us, the appellants argued that the purported gift of the property was null and void under Islamic law because the property was not then nor at any time thereafter in the possession of the deceased as the property was rented out, and neither was the possession of the property ever handed to the respondent during the lifetime of the deceased nor was it legally vested in the name of the respondent during the deceased's lifetime even though the deceased had the opportunity to do so when the deceased went to the Land Registry to amend his name in the title of the property. Besides, the deceased was receiving the rental income during his lifetime, thus demonstrating that the deceased had no actual intention to gift the property to the respondent and cited several authorities in support. The appellants concluded by saying that since the gift was void the property becomes part of the estate of the deceased and all the deceased's beneficiaries are entitled to a share in the estate as set out in the Holy Quran, Ahadis and Sunnah of the Holy Prophet.

[10] With respect, we do not agree with the appellants. We agree with the learned trial judge that there was a valid transfer of the gift of the property to the respondent. In arriving at our decision, we have considered the submissions of both the parties.

ISLAMIC LAW

[11] Under Islamic law, a man may lawfully make a gift of his property during his lifetime provided the following three conditions are fulfilled:

(i) a manifestation of the wish of the donor to give;

(ii) the acceptance of the donee either impliedly or expressly; and

(iii) the taking possession of the subject matter of the gift by the donee, either actually or constructively.

(see *Tengku Haji Jaafar ibni Almarhum Tengku Muda Ali & Anor v Government of Pahang* [1987] 2 MLJ 74; *Roberts alias Kamarulzaman v Ummi Kalthom* [1996] 1 MLJ 163; and BR Verma's *Islamic Law — Personal* (6th Ed, 1991) p 554).

[12] It has been decided in the case law that in applying the rules of the Islamic law relating to gifts the rigour of unmeaning technicalities should not be enforced, divorced from the realities of the particular situation in individual cases, and that the courts should avoid an impractical approach to the question (see *Azeshabi v Kathoonbi* AIR 1966 Madras 462).

[13] Under Islamic law delivery of possession of the property by the donee is an essential element to constitute a complete gift. However, the exception to this general rule where the gift is from a father to his minor son in which case delivery of

possession is not necessary at all. The law will be satisfied without change of possession and will presume subsequent holding of the property to be on behalf of the minor. All that would be necessary if at all is a bona fide intention to give (see BR Verma's *Islamic Law — Personal* (6th Ed, 1991) p 583).

[14] In *Fateh Mohd v Mitha* AIR 1926 Lahore 286, the father executed a deed of gift of land in favour of the minor son. Before registration of the deed of gift, the father sold the land to a third party and the sale was registered. When the deed of gift was presented for registration, it was objected by the father. It was held in that case that under Islamic law, a deed of gift executed by father to his minor son is complete and binding as soon as the donor executes the deed, and neither registration nor delivery of possession is necessary to make it complete. This exception to the general rule for possession has been acknowledged by the court in *Noor Jahan v Muftkhar Dad Khan* AIR 1970 All 170 at p 176. Similarly here, the exception applies to the present case. The gift was complete even without the transfer of possession.

[15] In the case before us, there is no dispute that the property was a rent controlled property and was tenanted since the deceased purchased the property. Thus, there was no physical possession of the property by the deceased but only legal possession. The possession of the property could only be symbolic since the property was tenanted. (see *Noor Jahan* at p 178). Hence, physical delivery of possession could not be given to the respondent. The collection of rental by the deceased trustee would be equivalent to possession of the property by the deceased trustee on behalf of the respondent beneficiary. However, the deceased had effected a legal transfer of the property in favour of the trustee on trust for the respondent and thereby transferred the legal possession of the property to the respondent. This was the only means for effecting transfer under our National Land Code 1965 ('the NLC'). Hence, the deceased had done everything possible within his means to deliver legal possession as the gifted property is susceptible of. Thus, the deceased's bona fide intention to give the property as a gift to the respondent is manifestly clear and unequivocal.

[16] In our case, there is no dispute that the respondent had subsequently vested the property in his name. Hence, the gift had been perfected. In *Muhara Bibi v Maharulla* AIR 1933 Calcutta 785, it was held that though a gift may be invalid for want of delivery of possession, it may be validated by obtaining possession subsequent to the gift.

[17] It is also no disputed that the trust was created and the transfer was executed on the same date 2 February 1968 and the respondent lived with the deceased father until the latter passed away in 1991 and for the period of 23 years since the creation of trust the deceased did not attempt to revoke the trust or the transfer effected in favour of the respondent. So, the presumption is that the gift was valid (see *Azeshabi* at p 463).

[18] In this case, the three conditions for a valid gift under the Islamic law had been fully satisfied. It is therefore our firm view that the gift was validly made even under the Islamic law and the learned judge was right in dismissing the appellants' claim.

CIVIL LAW

[19] However, in the instant case, the applicability of Islamic law is subject to the civil law which are applicable to all irrespective of whether the parties are Muslims and non-Muslims. And here there are no preserving rules of Islamic law in the applicable land law and the law of trust that govern this case.

[20] Thus, in *Ainan bin Mahamud v Syed Abu Bakar bin Habib Yusoff & Others* [1939] MLJ 209 it was held that the Evidence Enactment is a statute of general application and all the inhabitants of the Federated Malay States are subject to its provisions whatever may be their race or religion. In questions of legitimacy in the case of Muslims, s 112 of the Evidence Enactment applies to the exclusion of the rule of Islamic law.

[21] *In the Matter of Omar bin Shaik Salleh (M) and Hanisah binte Shaik Salleh (f), Infants; Shaik Salleh bin Omar Jammal v Marriambee binte Shaik Omar (mw)* [1948] MLJ 186, it was held that in this case there is legislation in general terms regulating the matter (guardianship), making no exception in the case of Muslims and therefore, the Ordinance, in this case the Guardianship of Infants Ordinance (Cap 50), must be taken to supersede whatever law might have been applicable previously.

[22] Further, in *Tengku Haji Jaafar Ibni Almarhum Tengku Muda Ali & Anor v Government of Pahang* [1987] 2 MLJ 74, the Supreme Court recognized the following laws affecting land generally in the State of Pahang before 1889: (i) General Land Regulations 1889; (ii) the Land Enactment 1897; (iii) he Land Enactment 1903; and (iv) the Land Enactment 1911; and these laws were applicable in the State of Pahang after the signing of the Treaty of Pahang on 8 October 1887. But because the gift of the subject land by the former Sultan of Pahang to the appellants was effected in 1887, ie two years before the first Land Regulations 1889 was enacted, the Supreme Court applied Islamic law as the land law applicable to the gift in Pahang then was Islamic law and not because the parties were Muslims. If there had been a registered transfer under any Enactment, Ordinance or Regulation then the Supreme Court would not have applied Islamic law but the relevant Enactment, Ordinance or Regulation as were applicable then. Indeed in the same case, the Supreme Court upheld the application of the law of limitation which is governed by the Limitation Act 1953.

[23] In *Wan Naimah v Wan Mohamad Nawawi* [1974] 1 MLJ 41 which involved Muslim family, the Federal Court applied trust law and not Islamic law to enforce a gift by an oral declaration of trust. And it must be noted that the plaintiff in this case

never had possession of the property and the court applied trust law to dispose of the matter in the plaintiff's favour. A

[24] In *Re Man bin Mihat, Decd* [1965] 2 MLJ 1 also involving Muslim family, the court applied trust law and not Islamic law to determine the issue. Suffian J (as he then was) at p 3 said: B

> Indeed it is quite common for a Muslim to buy land for his minor children and have himself in the Land Office records as trustee …
>
> During his lifetime the land is trust property and his death does not alter its character … So long as any object of the trust remains unperformed the trust cannot be defeated and may be enforced by the widow (beneficiary)" C

The principle in *Re Man* was followed by Abdul Hamid J (as he then was) in *Re Bahadun bin Haji Hassan Decd* [1974] 1 MLJ 14 with regard to proceeds from insurance policy.

D

[25] It is worthy of note that in India the courts strictly applied Islamic law not merely because the parties are Muslims but because s 129 of the Indian Transfer of Property Act 1883 expressly preserves the rule of Islamic law as regards gifts. However, in Malaysia, we do not have any such preservation or saving provisions of Islamic law in the NLC, and therefore the law applicable to our case is civil law in particular the land law, and the law of trust, and that they should be applied to all E parties regardless of whether they are Muslims or non-Muslims. Hence, the Indian cases cited by the appellants are to be viewed in the context of the Indian law, and therefore not applicable here.

[26] In the present case, the transfer is duly registered in favour of the deceased as F the trustee for the respondent. Therefore, under s 340(1) of the NLC, the deceased trustee would have indefeasible title and such indefeasibility could only be defeated by any of the specified grounds under s 340(2) thereof (see *Tan Chiw Thoo v Tee Kim Kuay* [1997] 2 MLJ 221). However, as rightly pointed by the learned judge, the appellants have not brought themselves within s 340(2) of the NLC, and therefore, the appellants are not entitled to the declaration that the trust deed and the transfer G were null and void.

[27] For the reasons given, we are of the view that there was a clean and clear transfer of the property to the trustee and a written trust deed executed by the deceased which had been duly registered with the Land Registry. The intention of the H deceased to give the property as a gift to the respondent is very clear by the express terms of the trust deed. In fact, the registration of the legal transfer is the only way the property could be transferred to the trustee under the NLC which the deceased had done in this case. The deceased did not reserve any express power of revocation in the trust deed. Further, there was no objection from the appellants during the I deceased's lifetime over the creation of trust in favour of the respondent. We therefore agree with the respondent that the trust is valid and irrevocable. It is a completely constituted trust and thus enforceable against the deceased or his estate, irrespective of whether or not possession of the property was given to the respondent during the

lifetime of the deceased and whether or not the property was vested in the name of the respondent during the lifetime of the deceased and whether or not the deceased received and declared the rental as his personal income. Thus, the learned judge was right in deciding the case in the respondent's favour.

[28] My learned brother, Richard Malanjum FCJ has seen this judgment in draft and has expressed his agreement with it. However, my learned brother Abdul Kadir Sulaiman FCJ has since retired and has no opportunity to see the judgment in draft.

Appeal dismissed.

Reported by Loo Lai Mee